

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

Numerous issues were presented to the Administrative Law Judge for determination. At oral argument, the parties narrowed the issues for review by the Appeals Board to the following:

- (1) Nature and extent of disability.
- (2) Liability of the Kansas Workers Compensation Fund.
- (3) Whether the Kansas Workers Compensation Fund is entitled to its attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds as follows:

- (1) Claimant is entitled to permanent partial disability benefits based upon an impairment of function rating of eighteen percent (18%) as found by the Administrative Law Judge.

As Administrative Law Judge Robert H. Foerschler does a very good job of summarizing the evidence presented in this proceeding in his Award of December 17, 1993, a complete recitation of the facts is unnecessary. The Appeals Board agrees with Administrative Law Judge Foerschler that claimant experienced a compensable, work related accident on January 26, 1989, that has resulted in a permanent impairment of function to the body as a whole of between seventeen and twenty-five percent (17-25%) based upon the ratings provided by respondent's medical expert witness, David John Clymer, M.D., and claimant's expert medical witness, James C. Bolin, D.O. Dr. Clymer's opinion has been given somewhat more weight than Dr. Bolin's as his opinion appears more in line with claimant's symptomatology and abilities.

- (2) The Appeals Board agrees with the finding of the Administrative Law Judge that there is no Fund liability in this proceeding.

The respondent has failed to prove that it had knowledge of an impairment that would constitute a handicap in claimant's obtaining or retaining employment prior to claimant's accident in January 1989. This is one of the elements that must be proved pursuant to K.S.A. 44-567. After carefully reviewing the record, the only evidence regarding knowledge was from the testimony of claimant when he testified that his supervisors were probably aware of the automobile accident that occurred in January of 1988, as they may have witnessed it. Also, claimant testified that his supervisors were aware of the treatment he subsequently received for the 1988 automobile accident and that he kept his team leader apprised of his treatment. However, the Appeals Board also finds that claimant was off work approximately six weeks, then released from treatment without restrictions after the 1988 automobile accident. Respondent never changed claimant's job duties, or in any other way accommodated claimant, which would have been an indication that it had knowledge of an impairment, nor did respondent file a Form 88 to officially report to the Division of Workers Compensation that claimant had an impairment that would

constitute a handicap in obtaining or retaining employment.

(3) The Administrative Law Judge ordered the respondent to pay attorney fees to the Kansas Workers Compensation Fund. The Appeals Board notes that Fund counsel's statement for attorney fees was attached to the submittal letter and no opportunity was afforded the respondent to contest the reasonableness of the fee or voice other objections regarding same. Therefore, this proceeding should be remanded to the Administrative Law Judge for hearing upon the issue of the Fund's attorney fees, including those incurred in connection with this review.

(4) The Appeals Board hereby incorporates by reference all findings of fact and conclusions of law as set forth by Administrative Law Judge Robert H. Foerschler in his Award dated December 17, 1993, that are not inconsistent with the findings and conclusions specifically set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated December 17, 1993, is affirmed in part and modified in part, as follows:

(1) That the award for payment of the Kansas Workers Compensation Fund's attorney fees is set aside and that this proceeding be remanded to the Administrative Law Judge for hearing after due notice to address this issue.

(2) That all other orders of the Administrative Law Judge in the Award of December 17, 1993, are hereby adopted and incorporated herein by reference as if fully set forth herein that are not inconsistent with the findings and conclusions above.

IT IS SO ORDERED.

Dated this ____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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GUY A. MERANDO

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DOCKET NO. 138,812

Robert H. Foerschler, Administrative Law Judge
George Gomez, Director